

Calendar No. 949

91ST CONGRESS }
2d Session }

SENATE

{ REPORT
{ No. 91-953

KIMBALL BROS. LUMBER CO.

JUNE 24, 1970.—Ordered to be printed

Mr. EASTLAND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 13740]

The Committee on the Judiciary, to which was referred the bill (H.R. 13740) for the relief of Kimball Bros. Lumber Co., having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the proposed legislation is to pay the Kimball Bros. Lumber Co., of Dexter, Oreg., a partnership composed of Clyde K. Kimball, Clayton Kimball, Kendall V. Kimball, Edgar Dowdy, and Arthur Lindley \$13,726.62 in full satisfaction of all claims of the partnership against the United States for the cost of road construction incurred by it under a timber sale contract numbered 18-997 with the Forest Service, Department of Agriculture. The road costs were to be offset against the price charged for the timber in accordance with the contract but were not so amortized because the contract was canceled after fire destroyed most of the timber before it was removed, but after the road had been constructed.

STATEMENT

In its favorable report, the Committee on the Judiciary of the House of Representatives said:

The Agriculture Department in its report to the committee on the bill stated it would have no objection to its enactment if it were amended to provide for a payment of \$13,726.62. The committee has recommended that the bill be amended to provide for the payment of that amount.

The contract referred to in the bill was entered into between the Forest Service of the Department of Agriculture, and Kimball Bros. Lumber Co. on November 23, 1965.

The contract involved in H.R. 13740 (No. 18-997, November 23, 1965) covered the sale of an estimated 2,450 M board feet of National Forest timber. The timber sale was awarded to Kimball Bros. Lumber Co. after it bid successfully against eight other bidders. During 1966 the company completed the access road into the sale area (0.95 mile). Timber felling began in 1967. By early August of that year an estimated 2,000 M board feet, on about 34 acres, had been felled and bucked. A small volume of timber in the form of logs had been removed from the sale area.

On August 8, 1967, lightning set a fire in the felled and bucked timber. The fire was controlled essentially on the sale area boundary. Company crews assisted in the control actions although the company was not operating when the fire started. Because of the extended drought preceding the fire, it burned intensely. Most of the remainder of the standing timber was damaged to some extent. The felled and bucked timber was damaged severely. Forest Service estimates made shortly after the fire indicated that the volume of merchantable felled and bucked timber had been reduced 50 to 60 percent as a result of the fire. Much of the loss occurred in the outer high-quality portions of the logs.

On September 22, 1967, Kimball Bros. Lumber Co. requested the Forest Service to cancel the sale or to reappraise the timber and establish new rates which reflected the loss in volume and value. Inasmuch as the timber sale contract did not provide for rate redetermination as a result of fire or other catastrophe, the Forest Service considered only the merits of cancellation. The burned timber was again examined and results of the preliminary examination were confirmed. Not only had there been a significant volume loss but also the volume destroyed included the clear, high-quality portions of the logs. In subsequent discussion the company officials stated that the logs were so badly damaged that they could not be used to produce the high-quality products in which the company specialized. Therefore to complete the sale they would be forced to sell the burned logs to other mills. However, other mills were unwilling to pay much for the logs. At the highest offer the company could obtain, they expected to lose about \$60,000. On the other hand, if the sale were canceled, the company's loss would be about \$25,000 which would consist of the unamortized cost of the road and the costs incurred to fell and buck the timber. The company apparently decided upon requesting cancellation as the lesser of two evils for in the discussions, local forest officers pointed out to the

company officials, that if cancellation were approved, the Forest Service had no authority to reimburse the company for these losses. At no time during the discussion did company officials indicate that they intended to submit such a claim, and from the foregoing statement it is clear that this would have had no effect because of the rights of the parties as defined under that particular contract.

In light of the fact that the value of the timber had been materially reduced as a result of the fire, the regional forester approved the Kimball Bros. request and canceled the sale contract on December 21, 1967.

The burned timber and some adjacent green timber were combined in a new offering and sold on June 13, 1968. The road constructed by Kimball Bros. Lumber Co. is being used to remove the timber in the new sale and in the future will be used to remove adjacent timber. The committee feels that this subsequent use of the road shows that the Government has benefited from this particular road construction.

In Forest Service timber sale contracts, including the contract executed by Kimball Bros. Lumber Co., the amount of road cost to be amortized is based on an estimate made prior to offering the sale and stated in the contract. Under certain circumstances the stated amount may be adjusted to reflect construction of alternate roads or other changed conditions, but may not be adjusted because the purchaser's cost is different from the estimate whether his cost was less or whether it was more. In the subject contract the estimated road cost was \$15,010. Kimball Bros. constructed the road as planned. Thus \$15,010 was the maximum amount which could have been amortized, regardless of the company's cost. At the time of the fire some amortization had been accomplished on volume which had been removed and paid for. This was as follows:

Species	Volume thousand board feet	Amortization rate per thousand	Amortization amount
Douglas-fir	154.05	\$8.27	\$1,273.99
Hemlock and others	2.89	3.25	9.39
Total	156.94		1,283.38

Thus the maximum amount of amortization with the company could have received on remaining timber was:

Total estimated road cost	\$15,010.00
Less amortized to date of fire	1,283.38
Remaining to amortize	13,726.62

For this reason the Department recommended that the amount to be paid to Kimball Bros. Lumber Co. should not exceed \$13,726.62. This is the amount the company would have recaptured for the completed roadwork if the sale had proceeded to conclusion.

The committee has concluded that the facts outlined above and in the comments of the Department of Agriculture provide a clear basis for legislative relief. The company contracted in good faith to construct the road in the belief that the cost of the construction would be offset against the amounts to be paid for the timber. Through no fault on its part fire destroyed the value of the timber to the degree that further performance under the contract would produce a serious loss. This was recognized by the Government which terminated the contract, but admittedly nothing could be done about the costs already incurred for the road. The Department has noted that a subsequent contractor was able to use the road in logging the burnedout timber. Further the road will be of continuing benefit to the Government in logging adjacent timber. Clearly it is inequitable to impose this loss on this company under these circumstances for the Government has benefited by the construction of the road. It is recommended that the bill, amended to conform to the recommendations of the Department of Agriculture, be favorably considered.

The committee is advised that an attorney has rendered services in connection with this matter, and therefore the bill carries the customary language limiting attorney's fees.

The committee believes that the bill is meritorious and recommends it favorably.

Attached and made a part of this report is a letter from the Department of Agriculture dated February 16, 1970.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., February 16, 1970.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: As requested by your letter of January 30, 1970, here are our views on H.R. 13740, a bill, for the relief of Kimball Bros. Lumber Co.

H.R. 13740 would direct the Secretary of the Treasury to pay to Kimball Bros Lumber Co. the sum of \$14,774.22. The payment would be in full satisfaction of all that company's claims against the United States for compensation of losses incurred in connection with the performance of a timber sale contract between the company and the Forest Service.

For the reasons expressed in the attachment to this letter, and if the Congress feels that the equities warrant it, we would have no objection to enactment of H.R. 13740 if the amount it would direct to be paid to Kimball Bros. Lumber Co. were changed to \$13,726.62.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely,

J. PHIL CAMPBELL,
Under Secretary.

USDA COMMENTS ON H.R. 13740

The contract involved in H.R. 13740 (No. 18-997, November 23, 1965) covered the sale of an estimated 2,450 M board feet of national forest timber. The timber sale was awarded to Kimball Bros. Lumber Co. after it bid successfully against eight other bidders. During 1966 the company completed the access road into the sale area (0.95 mile). Timber felling began in 1967. By early August of that year an estimated 2,000 M board feet, on about 34 acres, had been felled and bucked. A small volume of timber in the form of logs had been removed from the sale area.

On August 8, 1967, lightning set a fire in the felled and bucked timber. The fire was controlled essentially on the sale area boundary. Company crews assisted in the control actions although the company was not operating when the fire started. Because of the extended drought preceding the fire, it burned intensely. Most of the remainder of the standing timber was damaged to some extent. The felled and bucked timber was damaged severely. Forest Service estimates made shortly after the fire indicated that the volume of merchantable felled and bucked timber had been reduced 50 to 60 percent as a result of the fire. Much of the loss occurred in the outer high-quality portions of the logs.

On September 22, 1967, Kimball Bros. Lumber Co. requested the Forest Service to cancel the sale or to reappraise the timber and establish new rates which reflected the loss in volume and value. Inasmuch as the timber sale contract did not provide for rate redetermination as a result of fire or other catastrophe, the Forest Service considered only the merits of cancellation. The burned timber was again examined and results of the preliminary examination were confirmed. Not only had there been a significant volume loss but also the volume destroyed included the clear, high-quality portions of the logs. In subsequent discussion the company officials stated that the logs were so badly damaged that they could not be used to produce the high-quality products in which the company specialized. Therefore to complete the sale they would be forced to sell the burned logs to other mills. However, other mills were unwilling to pay much for the logs. At the highest offer the company could obtain, they expected to lose about \$60,000. On the other hand, if the sale were canceled, the company's loss would be about \$25,000 which would consist of the unamortized cost of the road and the costs incurred to fell and buck the timber. In the discussions, local forest officers pointed out to the company officials, that if cancellation were approved, the Forest Service had no authority to reimburse the company for these losses. At no time during the discussion did company officials indicate that they intended to submit such a claim.

Finding that the value of the timber had been materially reduced as a result of the fire, the regional forester approved the Kimball Bros. request and canceled the sale contract on December 21, 1967.

The burned timber and some adjacent green timber were combined in a new offering and sold on June 13, 1968. The road constructed by Kimball Bros. Lumber Co. is being used to remove the timber in the new sale and in the future will be used to remove adjacent timber.

In Forest Service timber sale contracts, including the contract exe-

cuted by Kimball Bros. Lumber Co., the amount of road cost to be amortized is based on an estimate made prior to offering the sale and stated in the contract. Under certain circumstances the stated amount may be adjusted to reflect construction of alternate roads or other changed conditions, but may not be adjusted because the purchaser's cost is different from the estimate whether his cost was less or whether it was more. In the subject contract the estimated road cost was \$15,010. Kimball Bros. constructed the road as planned. Thus \$15,010 was the maximum amount which could have been amortized, regardless of the company's cost. At the time of the fire some amortization had been accomplished on volume which had been removed and paid for. This was as follows:

Species	Volume, thousand board feet	Amortization rate per thousand	Amortization amount
Douglas-fir.....	154. 05	\$8. 27	\$1, 273. 99
Hemlock and others.....	2. 89	3. 25	9. 39
Total.....	156. 94		1, 283. 38

Thus the maximum amount of amortization which the company could have received on remaining timber was:

Total estimated road cost.....	\$15, 010. 00
Less amortized to date of fire.....	1, 283. 38

Remaining to amortize.....	13, 726. 62
----------------------------	-------------

Therefore the amount to be paid to Kimball Bros. Lumber Co. should not exceed \$13,726.62. This is the amount the company would have recaptured for the completed road work if the sale had proceeded to conclusion.

○



